No. 87-1295

In The

Supreme Court of the United States

October Term 1988

UNITED STATES OF AMERICA,

Petitioner,

v.

ANDREW SOKOLOW,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT ANDREW SOKOLOW

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QUESTION PRESENTED

Whether a court must require more than the unsubstantiated conclusions of a federal drug enforcement agent in determining the existence of reasonable suspicion to justify a seizure of a person?

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JURISDICTION

The judgment of the court of appeals was entered on January 28, 1987. A petition for rehearing was denied on November 4, 1987 (Pet. App. 1a-2a) and a supplemental petition for rehearing was also denied on May 11, 1988 (J.A. 67). A petition for writ of certiorari was filed on February 2, 1988 and the petition was granted on June 6, 1988. The Jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

On July 22, 1984 United Airlines ticket agent John Birt made a cash sale of two round trip tickets scheduled to depart from Hawaii that day for Miami via Chicago with an open return. The sale had been made to a man dressed in a black jumpsuit and wearing gold jewelry, who was accompanied by a woman. In payment for the tickets, Mr. Birt took $2100 from a roll of twenty dollar bills approximately twice that size handed to him by the man, and returned the balance of approximately $2,000.00. The tickets were made out to Andrew Kray and Janet Norian. At the request of Mr. Birt, the man gave him a call-back telephone number. The man appeared to the ticket agent to be nervous at the time of the ticket sale, just prior to the man catching his flight. Mr. Birt notified the Honolulu Police Department of the transaction. J.A. 15, 18, 41, 42.

Based upon this information alone, Officer McCarthy of the Honolulu Police Department and Airport Task Force notified the Drug Enforcement Administration

(DEA) and thereby initiated a Federal and State investigation. The DEA began by determining that the phone number given to Mr. Birt was listed to a Karl Herman of 348-A Royal Hawaiian Avenue, Honolulu, Hawaii. J.A. 15, 18-19, 42, 46. Two days later, Officer McCarthy called the phone number and had John Birt listen to a taped message. Mr. Birt confirmed that the voice on the taped message belonged to the man who purchased the tickets for Miami thereby verifying that the call back number left by Andrew Kary was correct. J.A. 15-16, 42-43, 44, 45-46. No attempt was made to discover whether Andrew Kray and Karl Herman were living as roommates at the Royal Hawaiian address.[1]

On July 24, 1984, Officer McCarthy was informed that return reservations to Hawaii had been made in the name of Kray and Norian scheduled to arrive in Honolulu on July 25, 1984 with stopovers in Denver and Los Angeles. J.A. 16, 19, 43. Agents in Los Angeles were alerted. They observed that Sokolow appeared to by very nervous and "was looking all around the waiting area," but made no attempt to speak with him. J.A. 43, 44.

At 6:30 p.m. on the following day, Andrew Sokolow and his companion deplaned in Honolulu. Having no checked luggage consistent with their brief visit to Miami, they went directly to the street level taxi stand. J.A. 16, 19. They were prevented from entering a taxi by a large number of Federal officers and DEA agents who

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[1] Following Andrew Sokolow's (Andrew Kray) arrest, the agents learned that Mr. Sokolow and Karl Herman were roommates at the Royal Hawaiian Avenue address. J.A. 47.

grabbed and surrounded both Mr. Sokolow and his companion, forced them back to the sidewalk and sat them down. Pet. App. 47a; J.A. 31-32, 52-53.

After physically removing Mr. Sokolow from the taxi stand area, DEA Agent Kempshall then asked Mr. Sokolow for his plane ticket and identification. Having neither, Mr. Sokolow informed Agent Kempshall that his name was Andrew Sokolow and that he was traveling under his mothers maiden name, "Kray." He told the DEA agent that the tickets had been purchased for him by a man named "Marty." J.A. 16, 19, 55.

At 6:41 p.m., Andrew Sokolow and his companion were taken to the DEA office approximately 300 yards away and their luggage turned over to a U.S. Customs dog handler. Thirteen minutes later, the luggage was examined by Donker, a narcotics detection dog, who alerted to a brown shoulder bag. Andrew Sokolow was arrested. J.A. 16, 17, 19, 20. A search warrant was applied for based upon the dog's response. At 8:15 p.m., a federal warrant authorizing the search of the brown shoulder bag for narcotics only was issued. J.A. 11-12.

While waiting for the warrant, Andrew Sokolow was warned of his rights and he refused to make a statement. However, he was overheard on the phone to his attorney to say that he was in big trouble. J.A. 20. During this time, a woman was brought into the same area on an unrelated matter and she told the DEA agents that she knew Andrew Sokolow to have previously purchased a small amount of heroin from her supplier. Pet. App. 58a.

At 8:55 p.m., the shoulder bag was searched with negative results as to narcotics. During the search the

police also decided to recover airline tickets and found them to be in the name of Andrew Kray and James Wodehouse and receipts for Miami hotels. Pet. App. 58a.

Half an hour later, Janet Norian was released. Mr. Sokolow was not released until sometime after that. None of the luggage was released. J.A. 20, 21.

Donker was brought back to examine the luggage for a second time. At 9:30 p.m., approximately three hours after Mr. Sokolow had been seized and at least 35 minutes after failing to discover narcotics in the shoulder bag, Donker alerted to a medium sized Louis Vuitton carry-on bag to which he had sniffed earlier without alerting thereto. An unsuccessful attempt was made to obtain a second search warrant. J.A. 20.

On July 26, 1984 at 7:45 a.m., approximately 13 hours after Mr. Sokolow's seizure, another narcotics detection dog, Lady, was brought in by the U.S. Customs. This dog also alerted to the Louis Vuitton bag. A search warrant was obtained and 1000 grams of cocaine were discovered as a result of the search. J.A. 20.

Andrew Sokolow moved to suppress the evidence. Without identifying exactly when Mr. Sokolow was first seized, the United States Magistrate found that "the initial stop" of Mr. Sokolow was based upon elements of the "drug courier profile" and therefore constituted a reasonable and articulable basis for the initial stop. These elements included 1) payment for roundtrip tickets in cash; 2) the cash came from a roll of twenty dollar bills; 3) the tickets were for a brief trip to Miami which is "a known source city for drugs"; 4) Andrew Sokolow was travelling

under an assumed name; 5) Mr. Sokolow and his traveling companion did not check in any luggage and; 6) Mr. Sokolow was unable to produce either his ticket or any identification for Agent Kempshall. The Magistrate also found that all subsequent searches and seizures were reasonable and based upon probable cause and recommended denial of the motion. Pet. App. 60a-62a.

Mr. Sokolow filed an objection to the Magistrate's Report. The District Court conducted a de novo review of the motion and denied the motion based upon findings essentially identical to the findings of the Magistrate except that the District Court did hold that the initial contact between Agent Kempshall and Mr. Sokolow did not constitute a seizure implicating the Fourth Amendment. Pet. App. 52a-55a.

Mr. Sokolow entered a plea of guilty to the charges contained in the indictment, reserving the right to appeal the decision on the motion to suppress evidence. Mr. Sokolow was adjudged guilty and sentenced accordingly. J.A. 64, 65. An appeal was then taken to the Ninth Circuit Court of Appeals. J.A. 5.

Prior to rendering a decision, the Ninth Circuit Court of Appeals remanded the case to the District Court for specific findings of fact regarding the initial contact between Mr. Sokolow and Agent Kempshall and certain subsequent events. Pet. App. 50a-51a. In response, the District Court found that; 1) when the Federal agents first approached Mr. Sokolow, they took hold of Mr. Sokolow's arm and Mr. Sokolow reasonably believed that he was not free to leave; 2) the seizure of Mr. Sokolow was based on a "founded suspicion"; 3) Mr. Sokolow was

taken to the DEA office without his consent; 4) the detention of Mr. Sokolow in the office was the least invasive means for the DEA to verify or allay their suspicions. Pet. App. 47a-49a.

Upon review of the evidence presented at the suppression hearing and the District Court's findings of fact, the Court of Appeals reversed the decision of the District Court. Pet. App. 34a-46a. Concluding that the initial contact between Agent Kempshall and Mr. Sokolow unquestionably exceeded the permissible limits of a consensual encounter, the majority opinion held that a seizure implicating Mr. Sokolow's Fourth Amendment rights occurred at the moment that the agents grabbed him by the arm and sat him down on the sidewalk. Pet. App. 39a. The majority opinion further held that at the time of Mr. Sokolow's seizure, the facts regarding his conduct, which the agents found to have matched their DEA "drug courier profile," failed to establish a reasonable and articulable suspicion that he was engaged in criminal activity. Pet. App. 40a-43a. As such, the Court of Appeals concluded that the seizure of Mr. Sokolow violated the Fourth Amendment. Pet. App. 44a. Judge Wiggins dissented. Pet. App. 44a-46a.

A rehearing was granted at the request of the Government and a second amended opinion was issued. Again the Court of Appeals rejected the Government's arguments and reversed the decision of the District Court. Pet. App. 1a-33a. The majority opinion of the Court of Appeals reaffirmed the established principle that a limited seizure requires a reasonable suspicion that the person detained is engaged in criminal activity and

rejected the Government's suggestion that it automatically approve stops based upon a "drug courier profile" informally created by the DEA. Pet. App. 7a-21a. Judge Wiggins again dissented. Pet. App. 21a-33a.

SUMMARY OF ARGUMENT

The premature seizure of Mr. Sokolow by a DEA agent cannot be justified by mere reference to an assemblage of characteristics appearing in a "drug courier profile." Irrespective of their inclusion in a profile or their subjective characterization by an agent as being suspicious, the facts available to the agent at the time of the seizure must still give rise to a reasonable suspicion of criminal behavior. The articulated facts in this case fall far short of that mark. This is not a case in which law enforcement officers carefully developed their investigation based upon reliable information and then acted in a manner consistent with that information. Instead, the agents in this case took a bare handful of facts and manufactured suspicion out of their unverified suppositions. Rather than test these broadly drawn conclusions for reasonableness through prudent investigative techniques, the agents immediately effected a physical seizure of Mr. Sokolow in the street, outside the baggage claim area, in front of hundreds of people in a manner which cannot be said to be the least intrusive available to the agents.

This is one of the many cases arising out of the use of a "drug courier profile" by the Drug Enforcement Agency and represents a gross misuse of that investigative tool. The characteristics included in the profile and attributed to Mr. Sokolow prior to the seizure are "suspicious"

solely as a result of their inclusion in this informally compiled profile. The existence of characteristics which are not objectively suspicious cannot form the basis for a seizure merely because of their inclusion in the drug courier profile. The suspicions must be based upon articulable facts and found to be reasonable. To hold otherwise would be to enlarge upon the present limitations of an investigative detention to include seizures based upon the drug courier profile irrespective of the existence of reasonable suspicion. The requirement that the suspicion be both reasonable and that the factual basis be articulable preserves for the courts the power and responsibility of critically evaluating the justification for the seizure. It is not enough for the courts to rely upon the conclusory characterization by an agent that apparently innocent facts are suspicious and suggest criminal conduct. If such were the case, the scope of Fourth Amendment protections would be left to the discretion of law enforcement officers and the role of the courts would become an empty formality, dissimilar, only in name, from the open warrants out of which the Fourth Amendment protection arose.

Being nervous before a flight and during a layover, paying for tickets with cash, staying in Miami for a brief visit, having only carry-on luggage for a short trip, and living at an address where the phone number is listed to a roommate does not give rise to a reasonable suspicion that a person is engaged in criminal activity. At the time of the seizure of Mr. Sokolow, Agent Kempshall's information consisted only of these facts which, if suspicious at all, were so only by virtue of their inclusion in the drug courier profile. At this point, Agent Kempshall could have approached Mr. Sokolow and engaged him in consensual conversation in order to further investigate the

matter. If, as a result of that conversation, Agent Kempshall discovered objectively suspicious facts, sufficient cause might have existed for an investigative detention. Unfortunately, rather than pursue this prudent course of investigation, Agent Kempshall chose to engage in more intrusive measures and immediately effected a seizure of the person, thereby upsetting the delicate balance that must be maintained between the Fourth Amendment rights of individuals and the demands of law enforcement.

ARGUMENT

THE SEIZURE OF ANDREW SOKOLOW WAS MADE IN VIOLATION OF THE FOURTH AMENDMENT'S PROSCRIPTION AGAINST UNREASONABLE SEIZURES.

The seizure of Andrew Sokolow by Agent Kempshall was without sufficient legal justification to overcome the protections of the Fourth Amendment. Based upon the information available to Agent Kempshall at the time of the seizure, there may have been an adequate basis for further nonintrusive investigation, but clearly there was insufficient factual basis to justify a Fourth Amendment seizure.

A. AT A MINIMUM, A SEIZURE MUST BE BASED UPON A REASONABLE AND ARTICULABLE SUSPICION OF CRIMINAL ACTIVITY.

A seizure implicating the Fourth Amendment occurs whenever a law enforcement officer, by means of physical force or show of authority, has in some way restrained

the liberty of a citizen. *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968). In *Terry*, it was the officer's grabbing and turning of the suspect's body as he stood on the sidewalk that constituted the seizure. Other forms of physical restraint which have been found to constitute a Fourth Amendment seizure include the blocking of an individual's path or otherwise intercepting him to prevent his progress in any way,[2] or physical contact or a request to move in some manner.[3]

The fact that a seizure implicating the Fourth Amendment occurred at the moment of DEA Agent Kempshall's initial contact with Mr. Sokolow cannot be disputed. Agent Kempshall and a number of other federal officers surrounded Mr. Sokolow at the airport taxi area soon after his deplaning, yelled for other agents to get his companion, grabbed his arm, thus preventing his entering a taxi and physically removed him from the taxi area to the walkway and sat him down. Other agents did the same with Mr. Sokolow's female companion. The initial encounter between Agent Kempshall and Mr. Sokolow thus immediately triggered the protections of the Fourth Amendment.

A seizure having been effected, it became incumbent upon the government to demonstrate that the seizure was justified. As a limited exception to the general rule that seizures of the person require probable cause, the investigative detention exception is premised upon overriding

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[2] *United States v. Berry*, 670 F.2d 583, 597 (5th Cir. Unit B 1982); *United States v. Puglisi*, 723 F.2d 779, 783 (11th Cir. 1984).

[3] *United States v. Gonzales*, 842 F.2d 748, 752 (5th Cir. 1988).

law enforcement interests that are served by the limited intrusion upon Fourth Amendment protections. *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Brignoni-Ponce*, 442 U.S. 873 (1975); *Adams v. Williams*, 407 U.S. 143 (1972); *Terry v. Ohio*, 392 U.S. 1 (1968). Rather than requiring probable cause as with an arrest, this limited exception allows for brief detentions supported by articulable facts which would create a reasonable suspicion that a suspect is engaged in criminal activity. *Florida v. Royer*, 460 U.S. 491 (1983); *Reid v. Georgia*, 448 U.S. 438 (1980); *Terry v. Ohio*, 392 U.S. 1 (1968). Even a momentary detention must be supported by reasonable, objective grounds supporting a belief of criminal behavior. *Florida v. Royer*, 460 U.S. at 498, citing *United States v. Mendenhall*, 446 U.S. 544, 556 (1980). The belief must be supported by fair inferences from the objective facts, and not upon inchoate and unparticularized suspicions or hunches. *Terry v. Ohio*, 392 U.S. at 27. In addition, any subsequent examination of the reasonableness of the officer's suspicion of criminal activity must be based solely upon the facts known to the investigating police officer at the time of the seizure. *Terry v. Ohio*, 392 U.S. at 22; *United States v. Erwin*, 803 F.2d 1505 (9th Cir. 1986); *United States v. Garvin*, 576 F.Supp. 1110, 1114-1115 (N.D. Ill. E.D. 1983); *United States v. Berd*, 634 F.2d 979 (5th Cir. Unit B. 1981). Since the justification for this exception is the overriding need of law enforcement, it is only reasonable then that the intrusion upon Fourth Amendment interests therefore be limited to the actual requirements of that need. So, while the scope of the intrusion allowed by this exception will depend upon the particular facts and circumstances of each case, it is clear that the investigative methods

employed must be the least intrusive means reasonably available to verify or dispel the officer's suspicion of criminal activity. *Florida v. Royer*, 460 U.S. at 500; *United States v. Brignoni-Ponce*, 442 U.S. at 881-882; *Adams v. Williams*, 407 U.S. at 146. Furthermore, it is the state's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope to satisfy the conditions of an investigatory seizure. *Florida v. Royer*, 460 U.S. at 500.

At the time of Agent Kempshall's seizure of Mr. Sokolow, the agent knew only of the following facts: Mr. Sokolow had appeared nervous when he purchased his airline tickets, he had paid for his tickets in cash, he traveled to Miami and stayed for less than two days, he had appeared nervous during the layover in Los Angeles on his return trip, and he lived at an address where the telephone number was listed under another person's name.

These facts simply are not objectively suspicious of criminal behavior. While these facts might lead a trained officer of the law to have a hunch that a crime is afoot, such a hunch based solely on his opinion that certain characteristics are consistent with those which the agent believed were common to airport narcotics traffickers is wholly insufficient to justify an invasion of a constitutionally protected interest. Without attempting to verify or dispel his suspicion that Mr. Sokolow may be a drug trafficker by some less intrusive means such as a consensual conversation with Mr. Sokolow, Agent Kempshall decided to effect an immediate seizure of Mr. Sokolow at a place and in a manner that was unwarranted. The facts upon which the agent's action was based fell far short of

giving rise to a reasonable and articulable suspicion that Mr. Sokolow was engaged in criminal behavior. As a result, the seizure of Mr. Sokolow was made in blatant violation of the reasonableness requirement of the Fourth Amendment.

B. THE DRUG COURIER PROFILE CANNOT PROVIDE REASONABLE SUSPICION TO JUSTIFY AN INVESTIGATIVE STOP.

At the supression hearing, Agent Kempshall was asked on direct examination to explain why he suspected that Mr. Sokolow may have been transporting drugs when he stopped him curbside at the airport. He responded that the totality of the facts known to him at the time of the stop "had all the classic aspects of a drug courier." J.A. 59. In spite of this testimony, the Government's Brief disingenuously denies that the "drug courier profile" was used in the present case and scrupulously avoids the use of the term. However, the cases upon which the Government relies in support of its position on reasonable suspicion and Agent Kempshall's characterization of the facts makes the profile's application in this case apparent.

The drug courier profile is an informally compiled abstract of characteristics thought to be typical of persons carrying illicit drugs.[4] It is an abstract that does not allow for effective judicial review of the reasonableness of the seizure and is without empirical validation. The agents using the profile act under the assumption that some members of the general air traveling public carry illegal

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[4] *United States v. Mendenhall*, 446 U.S. 544, 547 n.1 (1980).

drugs. Without prior knowledge of facts suggestive of criminal behavior by a particular person, the agents seek out those air travelers whose conduct conforms with characteristics of the profile. Hence, a person engaged in entirely innocent behavior may instead become suspect to an investigating agent on the basis of the agent's "trained eye" and upon his own perception and conclusion that the person's conduct conforms with certain characteristics of narcotics traffickers.

Reliance by the courts upon characteristics of the drug courier profile as a basis for determining reasonable suspicion is fraught with dangers. The characteristics themselves are not objectively suspicious of criminal behavior, the validity of the profile has never been established, and the profile itself has been proven to have no predictive value in the investigation of airport narcotics trafficking. Instead, the profile merely reflects a subjective belief of law enforcement officers regarding drug couriers.

Judicial Review of Subjective Belief: In its determination of reasonable suspicion, the courts should not be satisfied with relying upon the conclusory characterizations by an agent that apparently innocent facts are suspicious and suggest criminal conduct. The actions of law enforcement officers must be such that it can be reviewed judicially by an objective standard. *United States v. Buenaventura-Ariza*, 615 F.2d 29, 36 (2nd Cir. 1980). Although the courts must review the facts based upon the fair inferences in light of the agent's experience, *Terry v. Ohio*, 392 U.S. at 30, "the fact that an officer is experienced does not require a court to accept all of his suspicions as reasonable, nor does mere experience mean

that an agent's perceptions are justified by the *objective* facts." *United States v. Buenaventura-Ariza*, 615 F.2d at 36; *United States v. Black*, 675 F.2d 129, 140 (7th Cir. 1982) (dissenting opinion of Swygert, Senior Circuit Judge). The requirement that there be specific, objective and articulable reasons for subjecting a person to an investigatory stop is intended to prevent an officer from freely acting on his own groundless suspicions. *Brown v. Texas*, 443 U.S. 47, 51 (1979).

To place undue reliance upon the agent's perceptions and conclusions would be to completely surrender the court's power and responsibility of critically evaluating whether a seizure is justified by a suspicion that is reasonable and a factual basis that is articulable. *United States v. Buenaventura-Ariza*, 615 F.2d at 37. Mechanical acceptance by the courts of the agent's conclusions would subjugate the scope of the Fourth Amendment to the discretion of law enforcement officers, leaving the role of the courts as an empty formality.

Lack of objective suspicion: Use of the drug courier profile in the determination of reasonable suspicion has been subject to judicial criticism due to the fact that the majority of the characteristics within the profile are not objectively suspicious of criminal behavior. Common characteristics such as arrival from a "source city" such as Miami, having little or no luggage, the cash purchase of airline tickets, or nervousness at the airport are characteristics which "describe a very large category of presumably innocent travelers." *Reid v. Georgia*, 448 U.S. 438, 441 (1980). These characteristics are as applicable to law-abiding citizens as to suspect individuals. *United States v. Berry*, 670 F.2d 583, 599 (5th Cir. Unit B 1982); *United States v. Pulvano*, 629 F.2d 1151, 1155 n.1 (5th Cir. 1980). They are also the characteristics attributed to Mr. Sokolow as a justification for his seizure.

The courts have criticized the profile element of "source city" specifically as providing no objective suspicion of criminal activity. A review of testimony by DEA agents in drug courier profile cases has revealed that the agents have characterized almost every major city in the United States as being a "source city," a city through which drug traffickers pass or a major narcotics distribution center. See e.g. *United States v. Pulvano*, 629 F.2d 1151, 1155 n.1 (5th Cir. 1980); *United States v. Andrews*, 600 F.2d 563, 566-567 (6th Cir. 1979); *United States v. Moore*, 675 F.2d 802, 808 (6th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983). *Reid v. Georgia* was especially critical of the use of the "source city" factor as a profile element to identify suspected drug traffickers. In that case, the Court found that a large percentage of the air traveling population "would be subject to virtually random seizures" if travel from a "source city" provided reasonable suspicion of criminal behavior. 448 U.S. at 441.

The *Reid* court voiced the same criticism of the profile factor of having little or no luggage. The cases show that couriers exhibited every possible behavior concerning luggage including no luggage, little luggage, carry-on luggage only, checked luggage only and both carry-on and checked luggage in relatively equivalent numbers. See e.g. *United States v. Mendenhall*, 446 U.S. 544 (1980); *Reid v. Georgia*, 448 U.S. 438 (1980); *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Elmore*, 595 F.2d 1036 (5th

Cir. 1979), *cert. denied*, 447 U.S. 1082 (1980); *United States v. Ballard*, 573 F.2d 913 (5th Cir. 1978).[5]

The profile factor of nervousness also fails to provide any objective suspicion of criminal behavior due to the countless innocent reasons why air travelers may be nervous before or after a flight. See e.g. *United States v. Buenaventura-Ariza*, 615 F.2d at 36; *United States v. Moore*, 675 F.2d 802, 808 (6th Cir. 1982), *cert. denied*, 460 U.S. 1068 (1983). Given the fact that this profile element is based upon the subjective perceptions of investigating agents or airline personnel, the courts have cautioned that in reviewing nervousness as a profile factor, "a court must, of course, attempt to distinguish between natural, innocent nervousness and nervousness resulting from 'preexisting fear in the mind of a person possessing illegal drugs.' " *United States v. Berry*, 670 F.2d 583, 596 n.11 (5th Cir. Unit B 1982), quoting from *United States v. Turner*, 628 F.2d 461, 466 (5th Cir. 1980), *cert. denied*, 451 U.S. 988 (1981).

The profile's lack of objective suspicion has thus led to the generally accepted conclusion that the exhibition of drug courier profile characteristics alone is insufficient to support a finding of reasonable suspicion. *Reid v. Georgia*, 448 U.S. 438, 440-441 (1980); *United States v. Morin*, 665 F.2d 765, 768 n.9 (5th Cir. 1982); *United States v. Buenaventura-Ariza*, 615 F.2d 29 (2nd Cir. 1980); *United States v. Andrews*, 600 F.2d 563 (6th Cir. 1979).

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[5] See also Cloud, *Search and Seizure by the Numbers: The Drug Courier Profile and Judicial Review of Investigative Formulas*, 65 Boston U. L. Rev. 843, 907-908 (1985).

Lack of Validation: Since the creation of the profile in the early 1970's, the government has never demonstrated that the profile accurately distinguishes drug couriers from innocent travelers. It has never provided objective proof of the validity of the profile's characteristics.[6]

In marked contrast to its informal drug courier profile, the government's airline "hijacker profile" was compiled on the basis of extensive studies of known hijackers by a task force which utilized statistical, sociological and psychological data and techniques. Significantly, the profile was tested systematically to measure its validity. The result was a reliable profile consisting of objective characteristics which sharply differentiates potential hijackers from the air-traveling public. The profile has remained consistent over the years and has been an effective measure in isolating potential hijackers.[7] The government's drug courier profile has never been subjected to any comparable process of validation. Absent such validation, any reliance on the profile is untenable.

The general absence of validation appears in this case as a total lack of substantiation for Agent Kempshall's conclusory opinion that Mr. Sokolow's actions were suspicious. See e.g. *Taylor v. Commonwealth*, 369 S.E.2d 423, 423 n.1 (Va. App. 1988). Even though Agent Kempshall testified as to his training and experience in airport narcotics trafficking, he failed to relate how such training and experience supported his suspicions based upon the

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[6] Cloud, 65 Boston U. L. Rev. at 858.

[7] Cloud, 65 Boston U. L. Rev. at 873-874, 877, 879.

particular facts of this case. The mere blanket assertion of training and experience does not automatically validate the hunches of an investigating agent.

Lack of predictive validity: Empirical data demonstrates that the drug courier profile has doubtful predictive value in identifying potential drug traffickers.[8] Only a small percentage of travelers stopped in profile cases are ever arrested. A majority of the characteristics fail to describe 90% of drug couriers. Only 10% or less of the defendants stopped exhibited the profile characteristics of being young, casually dressed, making last minute airline reservations and last minute ticket purchases, staying for only brief visits, having an unusual or circuitous itinerary, deplaning last, arrival in the early morning hours, or concealing a traveling companion. The characteristics of cash purchase of airline tickets, nervousness before contact by police and traveling under an alias were exhibited by less than 50% of the couriers. A review of the cases also reveals that even the characteristics involving luggage and "source city," which are the most common, lack any predictive validity due to their excessive breadth. See *supra*.

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[8] Cloud, 65 Boston U. L. Rev. at 886-920. The Cloud study analyzed 90 reported judicial opinions involving 103 defendants. The opinions were decided by 27 different state and federal courts during 1975 through 1983. An initial pool of approximately 200 reported opinions involving use of the drug courier profile was pared to delete cases where investigations and observations by DEA agents did not occur in airport terminals and where investigations occurred over a number of days. From the remaining pool of opinions, the subject cases were randomly selected to produce a target population of 100 defendants.

Lessening the profile's predictive value further is the fact that the profile varies from airport to airport. *United States v. Berry*, 670 F.2d at 598 n.17. It "tends to become blurred, as though the characteristics are shaped to fit the conduct instead of the other way around," *United States v. Garvin*, at 1112 n.1, and its variety of traits "defies any attempt at mechanical application[.]" *United States v. Knox*, 839 F.2d 285, 289 n.2 (6th Cir. 1988), petition for cert. filed, (No. 87-1927).

C. THE DRUG COURIER PROFILE IS PROPERLY USED ONLY AS AN INVESTIGATIVE TOOL AND NOT AS A SUBSTITUTE FOR REASONABLE SUSPICION.

The shortcomings of the drug courier profile which prevents its use to establish reasonable suspicion to justify a Fourth Amendent seizure do not necessarily prevent its use by law enforcement officers as an investigative tool. Although the police may not lawfully seize someone who merely exhibited a combination of profile characteristics, good police work might suggest the close surveillance of such person. The profile can usefully serve to "guid[e] law enforcement officers toward individuals on whom the officers should focus their attention in order to determine whether there is a basis for a specific and articulable suspicion that the particular individual is smuggling drugs." *United States v. Berry*, 670 F.2d at 600 n.21. If the officer's focus leads to the belief that further investigation is necessary, it is possible for him to engage in a non-intrusive encounter with the individual by approaching the individual and ascertaining whether the person is willing to cooperate and to then engage in consensual conversation. *Id*. This

procedure allows the officer to verify or dispel his suspicions through employment of the least intrusive means available, thereby conducting his investigation within the permissible limits of the Fourth Amendment. *Florida v. Royer*, 460 U.S. at 500; *United States v. Brignoni-Ponce*, 422 U.S. at 881-882.

This application of the drug courier profile has been widely employed. Cases involving the drug courier profile which have required judicial review illustrate the proper use of the profile as an investigative tool for law enforcement officers. The profile serves only to trigger law enforcement officers into investigating suspected drug traffickers by engaging in non-intrusive surveillances or consensual encounters with the suspected narcotics traffickers. No seizures are effected until objective facts suggestive of criminal activity are discovered during the course of the consensual encounters which serve to verify the officer's suspicions and to thereby justify a seizure of the suspect. The cases most commonly involve the discovery and confirmation of the suspect's use of an alias,[9] the uttering of untruthful, inconsistent, misleading or incriminating statements regarding the suspect's

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[9] *Florida v. Royer*, 460 U.S. 491 (1983); *United States v. Pulvano*, 629 F.2d 1151 (5th Cir. 1980); *United States v. Berry*, 670 F.2d 583 (5th Cir. Unit B 1982); *United States v. Puglisi*, 723 F.2d 779 (11th Cir. 1984); *United States v. Black*, 675 F.2d 129 (7th Cir. 1982); *United States v. Palen*, 793 F.2d 853 (7th Cir. 1986).

itinerary or travel companion,[10] or conduct such as the suspect's flight from police during the consensual encounter.[11]

D. THE FACTS KNOWN TO AGENT KEMPSHALL AT THE TIME OF HIS SEIZURE OF MR. SOKOLOW DID NOT GIVE RISE TO A REASONABLE AND ARTICULABLE SUSPICION THAT MR. SOKOLOW WAS ENGAGED IN CRIMINAL ACTIVITY.

Irrespective of their inclusion in a profile of drug couriers or their subjective and conclusory characterization as suspicious by an agent, the facts available to the agent at time of seizure must still give rise to a reasonable suspicion of criminal behavior. A lawful seizure requires that an objective review of the facts lead to the conclusion that the specific conduct of the person seized created a reasonable suspicion that the person was engaged in criminal activity. In the present case, the facts known to Agent Kempshall failed to meet the constitutional requirements of a lawful seizure.

Agent Kempshall effected a seizure of Mr. Sokolow solely on the basis of his knowledge that (1) Mr. Sokolow made a cash purchase of airline tickets just prior to

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[10] *United States v. Armstrong*, 722 F.2d 681 (11th Cir. 1984); *United States v. Poitier*, 818 F.2d 679 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 700 (1988); *United States v. Gonzales*, 842 F.2d 748 (5th Cir. 1988); *United States v. Pantazis*, 816 F.2d 361 (8th Cir. 1987); *United States v. Berd*, 634 F.2d 979 (5th Cir. Unit B 1981); *United States v. Borys*, 766 F.2d 304 (7th Cir. 1985), *cert. denied*, 474 U.S. 1082 (1986).

[11] *United States v. Haye*, 825 F.2d 32 (4th Cir. 1987)

departure and appeared nervous during the ticket purchase, (2) he and a companion traveled to Miami, via Chicago, where they stayed for less than two days, (3) they returned to Honolulu via Denver and Los Angeles and during the layover in Los Angeles, Mr. Sokolow appeared nervous, (4) both Mr. Sololow and his companion had only carry-on luggage, and (5) Mr. Sokolow lived at an address where the telephone was listed under another person's name.

Reid v. Georgia[12] involved facts comparable to the present case. Reid was seized by a DEA agent after deplaning at the Atlanta airport on the basis that (1) he had traveled to Fort Lauderdale, a source city for cocaine,[13] (2) he arrived in the early morning when law enforcement activity was diminished, (3) he had no luggage other than a carry-on shoulder bag, and (4) he had occasionally glanced at another male with a shoulder bag as they deplaned down the concourse, which appeared to the agent that they were trying to conceal the fact that they were traveling together.

The *Reid* court found that the facts regarding travel to Fort Lauderdale, arrival in the early morning and presence of only carry-on luggage described presumably innocent behavior and provided no basis for the agent to reasonably suspect Reid of criminal activity. Only Reid's conduct of glancing at his companion as walked down the concourse was found to relate to Reid's particular

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[12] 448 U.S. 438 (1980).

[13] The agent's investigation of Reid's airline ticket soon after the stop also showed that Reid had visited Fort Lauderdale for only one day.

conduct. However, the Court concluded that such particularized conduct could not have led the agent to suspect Reid of wrongdoing. On the basis of the totality of the observed circumstances, the Court concluded that as a matter of law, there were insufficient facts to support a reasonable suspicion of criminal activity. The agent's belief "was more an 'inchoate and unparticularized hunch [citation omitted] than a fair inference in the light of his experience." 448 U.S. at 441.

The conclusion reached on the facts in *Reid* is similarly warranted under the present facts. The fact that Mr. Sokolow traveled to Miami was behavior which was entirely innocent. It does not constitute particularized conduct on the part of Mr. Sokolow. His visit to Miami is not a fact which objectively supports any reasonable inference that he was engaged in criminal behavior. Similarly the fact that he only had carry-on luggage fails to give rise to a reasonable suspicion. Rather than raising any reasonable inference of criminal activity, this fact was instead entirely consistent with Mr. Sokolow's brief visit. If anything, his possession of many pieces of luggage would have been more suspect since it would have been inconsistent with his short stay.

Although the factors of Mr. Sokolow's cash purchase of his airline tickets and his nervousness may point to his particularized conduct, such conduct provided no basis for any inference that Mr. Sokolow was engaged in criminal activity. According to the Government, these facts created a suspicion that Mr. Sokolow was attempting to conceal his identity. At most, these facts only created a subjective belief or hunch.

In fact, if the government's suspicion that Mr. Sokolow was trying to conceal his identity had been reasonable, it was irreconcilable with the fact that Mr. Sokolow had left a correct call-back number for the ticket agent.[14] The discrepancy that the agents believed existed between the name listed to the phone number and the name left with the ticket agent could easily have been dispelled during the two days the agents had to investigate the case before Mr. Sokolow returned to Hawaii. Had they made the effort, they would have discovered without intrusion upon constitutionally protected interests that the listed name belonged to Mr. Sokolow's roommate. It is also not uncommon for individuals to use aliases in travel for reasons ranging from business to extra-marital affairs and even concealing a person's national origin or religious belief.

The fact that the DEA agent at the Los Angeles airport described Mr. Sokolow as appearing nervous during the layover was not a specific and articulable fact to support an inference that criminal behavior was afoot. All that was presented in this regard was the conclusory opinion of Agent Kempshall that the description given to him by others of Mr. Sokolow's appearance in Los

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[14] See e.g. *United States v. Berd*, 634 F.2d 979 (5th Cir. Unit B 1981); *United States v. Espinosa-Guerra*, 805 F.2d 1502 (11th Cir. 1986); *United States v. Knox*, 839 F.2d 285, 290 (6th Cir. 1988); where agents verified the call-back numbers provided by the defendants prior to effecting a seizure. In these cases, persons answering at the numbers denied any knowledge of the defendants, thereby justifying an inference of an attempt by the suspects to conceal their identity and therefore of criminal behavior.

Angeles and in Honolulu gave rise to a subjective belief that Mr. Sokolow was nervous and therefore suspicious. Despite the agent's conclusion, the record in the present case is wholly devoid of any objective facts which support any reasonable inference that Mr. Sokolow's perceived nervousness was the result of his being a drug trafficker. Without such objective facts, Mr. Sokolow's nervousness did not provide any reasonable and articulable suspicion of criminal behavior.

Even when viewed as a whole, the facts known to Agent Kempshall at the time of his seizure of Mr. Sokolow did not give rise to a reasonable and articulable suspicion that Mr. Sokolow was engaged in narcotics trafficking. If, as the Government's Brief contends, the drug courier profile was not applied in this case, then the inferences which Agent Kempshall made to characterize the activities of Mr. Sokolow as suspicious are without even the minimal support that the profile might provide. The facts in Mr. Sokolow's case were merely sufficient to provide the government with an "inchoate and unparticularized hunch" that Mr. Sokolow may have been involved in drug trafficking. The Government should have approached Mr. Sokolow and engaged him in consensual conversation in order to further investigate their hunch. If, during the course of that conversation, the government discovered objectively suspicious facts, sufficient cause might have then existed for an investigatory detention. Instead of pursuing this prudent course of investigation, the government chose to immediately effect a seizure of Mr. Sokolow, thereby crossing the line between the demands of law enforcement and the Fourth Amendment rights of citizens.

To condone the government's actions in Mr. Sokolow's case would be to enlarge upon the present limitation of an investigative detention to include seizures based upon the drug courier profile, irrespective of the existence of reasonable suspicion and to permit blanket approval of police seizures.

CONCLUSION

The Court of Appeals held that the seizure of Mr. Sokolow violated the Fourth Amendment because it was made in the absence of specific and articulable facts giving rise to a reasonable suspicion tha Mr. Sokolow was engaged in criminal activity. Based upon the foregoing reasons and principles, that decision should be affirmed.

Respectully submitted,

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